

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,  
 Plaintiff,

vs.

KENNETH GORDON WESCOTT,  
 Defendant.

Case No. 2:14-cr-00085-APG-CWH

**REPORT AND**  
**RECOMMENDATION**

This matter is before the Court on *pro se* Defendant Kenneth Gordon Wescott's ("Defendant") motion to dismiss the indictment for fatal errors (doc. # 142), filed June 29, 2015, and the government's opposition (doc. # 167), filed July 21, 2015. Wescott did not submit a reply.

**BACKGROUND**

On March 11, 2014, a federal grand jury indicted Defendant with one count of Coercion and Enticement in violation of 18 U.S.C. § 2422(b). (Doc. # 1). The original indictment was dismissed by the Court and a superseding indictment was issued by the federal grand jury against Defendant on June 2, 2015. (Doc. # 126). Defendant was arraigned on June 17, 2015, at which time he entered a plea of not guilty to the superseding indictment. (Doc. # 133). Trial is currently scheduled to commence on September 28, 2015.

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**DISCUSSION**

The original indictment in this case was dismissed because it failed, either by citation or by sufficient factual allegations, to identify Defendant's criminal sexual activity and to refer to the federal, state, or local criminal law that was allegedly violated. (Doc. # 121).

Defendant now moves to dismiss the superseding indictment for insufficiency, claiming that he is unaware of the offenses against which he must defend. Specifically, Defendant argues that he is unable to understand which of the various offenses listed in the statutes he is alleged to have violated. Additionally, Defendant argues that 18 U.S.C. § 2422 is unconstitutional, that the elements of the offense have not been sufficiently pleaded, and that he has the defense of entrapment available to him. The government, in response, disagrees with Defendant's assertions, claiming the indictment is constitutional, the indictment does address the elements of 18 U.S.C. § 2422, and the government did not entrap Defendant.

With respect to Defendant's first assertion regarding insufficiency of the superseding indictment, this Court observes that the indictment now alleges that Defendant engaged, and attempted to engage, in a sexual offense as defined in Nevada Revised Statute ("NRS") 179D.097 (defining sexual offenses), NRS 201.520 (sexual conduct), and NRS 432B.100 (sexual abuse). (Doc. #126, superseding indictment). As such, the Court finds that the government has remedied the previously insufficient indictment by adding the state statutes defining sexual activity, sexual offenses, and sexual conduct, and therefore the indictment sufficiently alleges the "sexual activity" for which any person can be charged with a criminal offense, as set forth in 18 U.S.C. § 2422(b). Further, the superseding indictment embodies all the elements of the crime, and clearly informs Defendant of the details that form the basis for the accusation, so as to enable him to prepare his defense and to plead judgment of any further prosecutions for the same offense. *See Hamling v. United States*, 418 U.S. 87, 117 (1974) ("It is generally sufficient that an indictment sets forth the offense in the words of the statute itself, as long as those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished"); *United States v. Mancuso*, 718 F.3d 780, 790 (9th Cir. 2013) (same).

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1 With respect to Defendant's assertion regarding the unconstitutionality of the superseding  
 2 indictment, this Court notes that it previously rejected Defendant's assertion (i.e., that internet use is  
 3 not a burden on interstate commerce and therefore 18 U.S.C. § 2422(b) is unconstitutional), with the  
 4 Court rejecting the same assertion at this time. *See* Doc # 109 (Court's prior report). After all, it is  
 5 well settled that the internet is an instrumentality of interstate commerce, and the indictment properly  
 6 invokes such to establish this Court's jurisdiction in this case. *See United States v. Tello*, 600 F.3d  
 7 1161, 1165 (9th Cir. 2010).

8 Finally, with respect to Defendant's assertion regarding the government's failure to satisfy all  
 9 of the elements of the offense (i.e., a victim must be less than 16 years of age and have actual parents  
 10 or guardians whose express consent was absent or avoided) because Defendant was corresponding with  
 11 an undercover police officer,<sup>1</sup> and Defendant's affirmative defense of entrapment, the Court finds that  
 12 it need not consider this prior to trial. The reason is that a motion to dismiss the indictment cannot be  
 13 used as a device for a summary trial of the evidence. *United States v. Jensen*, 93 F.3d 667, 669 (9th  
 14 Cir. 1996). Thus, "a defendant may not properly challenge an indictment, sufficient on its face, on  
 15 the ground that the allegations are not supported by adequate evidence." *Id.* (citation omitted). Nor  
 16 should a court consider evidence not appearing on the face of the indictment." *Id.* (citation omitted).

### 17 CONCLUSION AND RECOMMENDATION

18 Accordingly, **IT IS HEREBY RECOMMENDED** Defendant's motion to dismiss the  
 19 indictment for fatal errors (doc. # 142) be **denied**.

### 20 NOTICE

21 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in  
 22 writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held  
 23 that the courts of appeal may determine that an appeal has been waived due to the failure to file  
 24 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also  
 25 held that (1) failure to file objections within the specified time and (2) failure to properly address and  
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27 <sup>1</sup> The Court notes that an actual minor victim is not required for an attempt conviction under 18 U.S.C. § 2422(b)).  
 28 *See United States v. Meek*, 366 F.3d 705, 717 (9th Cir. 2004).

1 brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual  
2 issues from the order of the District Court. *See Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991);  
3 *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

4 DATED: August 4, 2015

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7 C.W. Hoffman, Jr.  
8 United States Magistrate Judge  
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